No. 11035.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JIM JUNG AND MARTY SHERMAN,

Appellants,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

APPELLANTS REPLY BRIEF.

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TOPICAL INDEX.

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Appellants have never believed it necessary in the taking of an appeal to characterize its contentions in the order of their importance or significance. However, in view of the fact that Appellee has seen fit to single out Appellants' procedural contention as the "principal contention of the Appellants," it is advisable to deal with this matter so that there is no possible misunderstanding, either in the minds of the members of this Honorable Court, or in the minds of counsel for Appellee.

Appellants have raised three contentions:

(1) Substantive (Point II of Appellants' Opening Brief).

(2) Evidentiary (Point III of Appellants' Opening Brief).

(3) Procedural (Point I of Appellants' Opening Brief).

If, at any time, this Honorable Court thought it necessary to inquire into Appellants' estimate of the relative degree of importance of their contentions on appeal, Appellants would submit said contentions in the order quoted above. Accordingly, Appellants will deal with the issues raised in the above order.

I.

The Trial Court Erred in Determining That It Was Obligatory Upon the "Intermediate Seller" to Inquire Into the Property of the Contract Carrier's Freight Rate Included by the "Country Shipper" in the Price of the Potatoes Purchased by the "Intermediate Seller" Upon a "Delivered" Basis.

It is gratifying to Appellants to note that Appellee has failed to meet and to reply to the arguments made and authorities cited in Subdivisions 1, 2, 3 and 4 of Point II of Appellants' Opening Brief. Appellee's only contentions in this regard have been that "Nothing appears in the record to support Appellants' contention that in computing their ceiling prices they relied on their sellers invoices nor was this contention ever urged below."

Let us look at the record.

The main source of disagreement between Appellants and Appellee from the outset of this controversy was the question as to the freight charge involved herein and the consequent mark-up thereon taken by Appellants. The case was tried below from beginning to end upon that basis. Appellee contended that Appellants could only take a mark-up on the basis of a freight charge of either eighteen cents, if delivered by contract carrier, or twenty-

two cents, if delivered by common carrier, whereas it was Appellants' contention that if they paid the freight charge of thirty cents as demanded by the country shipper, they could pass this charge on to their consumer in turn with the appropriate mark-up. Appellants refer this Honorable Court specifically to pages 57, 60 and 81 of the Transcript of Record on Appeal.

Appellants have constantly labelled the contract carrier's freight charge for the hauling of potatoes herein as "black market freight." The record clearly shows that during the months of April and May in the vicinity of Bakersfield, the charge of *all* contract carriers for hauling potatoes from Bakersfield to Los Angeles was thirty cents per hundred pounds. Not one contract carrier, but *every* contract carrier in the district was making the same charge, so that if any potatoes were to be shipped by contract carrier from Bakersfield to Los Angeles, Appellants either had to pay the thirty cents freight charge which the country shipper paid, or the potatoes would never have been delivered. Appellee evidently attempts to create the impression that Victory Produce Company singled out a contract carrier to pay a thirty cent freight charge to in order to evade the appropriate O. P. A. regulations. However, both of the witnesses who testified for plaintiff, Ruben Kundert and Jack Schnitzer, stated that during the months of April and May, 1943, every contract carrier in the area charged thirty cents per hundredweight for the hauling of potatoes and it was not until some time in May, at the insistence of the O. P. A. that all of the contract carriers went back to the eighteen cents per hundredweight charge. [See pp. 25-33 of Record.]

Thus, the entire controversy in question between Appellants and Appellee arose during a period when the contract carriers believed they had the right to charge thirty cents per hundred pounds to the country shipper, and the country shipper thought he had the right to pass on this charge of thirty cents to the intermediate seller, and Victory Produce Company, as intermediate seller, thought it had the right to include the freight charge of thirty cents in its computation of its selling price. If the Victory Produce Company had paid a charge of thirty cents per hundredweight, when the contract carrier had in fact only made a charge of eighteen cents per hundredweight, then Appellee's assertion as to "black market freight" would be understandable. But this was never the case and the Court specifically found that Victory Produce Company at all times acted in good faith and all practical precautions were taken against making overcharges. [R. 8.]

It is undisputed from the plaintiff's own case that their witness, Ruben Kundert, hauled the potatoes in question *for Marvin Berry* in April and May of 1943 from the Bakersfield area to the Victory Produce Company in Los Angeles and *charged to Marvin Berry* the sum of thirty cents for the haul. [R. 17 and 20.]

Nevertheless, Appellee asserts that because the invoices from the country shipper to Victory Produce Company were not introduced into evidence, therefore, there is no evidence in the record that Appellants relied upon said invoices showing the thirty cent freight charge involved. A brief glance at the record will dispose of this assertion.

All of the records of Victory Produce Company were in Court, including the invoices in question, and they would undoubtedly have been presented into evidence by either Appellee or Appellants were it not for the fact that the trial of the case was considerably shortened by reason of the many stipulations entered into between counsel at the trial. Throughout the record constant reference is made to "purchase invoice" or "purchase records" or "purchase tickets" from Marvin Berry. *The purchase invoices of Victory Produce Company of the potatoes in question and the country shippers sales invoices of said potatoes are one and the same thing* and the constant discussion both by the witnesses and counsel concerning these purchase records showing the freight charges involved make clear to any reasonable person that these were the invoices relied upon by Victory Produce Company in making the sales of the potatoes in question.

Appellants refer this Honorable Court to pages 36, 37, 39, 40 and 43 of the Transcript.

Moreover, defendant Marty Sherman, who testified as a witness for plaintiff under Section 2055 of the Code of Civil Procedure and for defendants on defense, testified that the selling price of Victory was based upon "the cost of the potatoes *delivered* to Los Angeles"—"on the purchase price *delivered to Los Angeles*" [R. 80], and further that "the Victory Produce Company purchased these potatoes from the country shipper on a *delivered* basis, at whatever the price was at the time of delivery." [R. 104.]

Thus, there is no question that the contract carrier charged Marvin Berry, the country shipper, thirty cents per hundredweight for hauling the potatoes from Bakersfield to the docks of the Victory Produce Company; that Marvin Berry passed this charge of thirty cents per hundred pounds on to Victory Produce Company; that Victory Produce Company paid this charge of thirty cents per hundred pounds for the hauling of the potatoes; and that Victory Produce Company in turn passed this thirty cent freight charge on to its purchaser in calculating the appropriate O. P. A. ceiling price. What other inference or deduction could there possibly be from the evidence in the record than that Victory Produce Company relied upon the charge to it by the country shipper of the potatoes, including the freight charge of thirty cents per hundredweight.

Appellee attempts to befog the issue by pointing out that Marvin Berry, the seller of the potatoes to Victory Produce Company, was also a partner in the Victory Produce Company. Apart from the fact that this comment has no legal materiality or relevancy, Appellants wish to refer this Honorable Court to the following portion of the record appearing on page 77.

> "By Miss Marten: How long did the partnership of yourself, Jim Jung and Marvin Berry, which you formed on April 5, 1943, continue in existence? A. Roughly about two weeks, but the dissolvement was not completed until some 75 days after we got together, I believe."

Furthermore, Appellee attempts to create a false issue by stating that the freight charge was paid by the Victory Produce Company directly to the carrier, and bases this assertion upon a purported statement made at the trial by Mr. Lerner, counsel for Appellants, appearing on pages 43-44 of the Transcript. First, it should be pointed out that the quotation appearing on page 10 of Appellee's brief was immediately followed by the statement of Miss Marten of counsel for Appellee, "We don't stipulate to that, Your Honor." [R. 44.] However, Appellants are willing to abide by the statement made by Mr. Lerner, and quoted in Appellee's brief, provided counsel for Appellee accept the entire statement as made, including the statement that the freight was paid by Victory Produce Company directly to the Edison Trucking Company as a matter of bookkeeping convenience at the request of Mr. Berry, and that said freight charge would thereafter be deducted from the price billed to Victory Produce Company by Marvin Berry.

All of the aforesaid contentions of Appellants were raised at the time of trial in the argument of the case, which argument has not been reported, and in the trial briefs submitted by the parties. Nevertheless, even in the absence thereof, so long as the issues have been raised by the evidence presented at the trial of the case, Appellants have the right to raise any questions of substantive law resulting therefrom for consideration by this Honorable Court.

II.

The Evidence Was Insufficient to Support the Judgment Against Appellants.

Appellee has likewise seen fit in answering Subdivision A of Point III of Appellants' Opening Brief to place its reliance chiefly upon its assertion that the contentions made therein were not made below, which contention has already been dealt with.

Appellants have contended that plaintiff failed to prove that the freight charge of eighteen cents per hundred pounds for the hauling of potatoes established the appropriate ceiling which Appellants could pay therefor because of the inapplicability of the General Maximum Price Regulation to the situation involved. The only answer of the O. P. A. is the statement that "the cost of a commodity to the seller cannot possibly mean the cost augmented by illegal freight charges." This answer assumes a position, not by analyzing the issues involved, but by merely branding a label thereon. No further reply thereto is therefore necessary.

With reference to Subdivision B of Point III of Appellants' Opening Brief, Appellee asserts that evidence as to the common carrier rates were simply irrelevant. That was Appellants' position at the time of the trial, but trial counsel for the O. P. A. evidently thought otherwise, in view of the fact that it presented a witness, George M. Meyers, whose testimony was solely confined to this particular issue. [R. 14-16.]

III.

The Judgment Was Improper Because the Partnership Known as Victory Produce Company Was Not a Party to This Action.

The procedural issue involved in this case is sharply drawn and further discussion thereof would be superfluous. In any event, Appellants would prefer that the issues involved in the instant case be decided upon their merits rather than upon a procedural technicality.

Wherefore, Appellants pray that this Honorable Court reverse the judgment heretofore entered in favor of plaintiff and against defendants.

Respectfully submitted.

EDWARD M. RASKIN,

Attorney for Appellants.